No. 15061

United States
COURT OF APPEALS
for the Ninth Circuit

WILLIA NIUKKANEN, also known as William Niukkanen, also known as William Albert Mackie,
Appellant,

vs.

JOHN P. BOYD, District Director, Immigration and Naturalization Service, United States Department of Justice, JOHN WILSON, Officer in Charge, Immigration and Naturalization Service Office,
Appellees.

BRIEF OF APPELLEES

Appeal from the United States District Court for the District of Oregon

C. E. LUCKEY,
United States Attorney,
District of Oregon,
JAMES W. MORRELL,
Assistant U. S. Attorney,
Attorneys for Appellees.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE., 7-13-56—45

INDEX

Contents of Brief

CITATIONS

Page

Cases

Statutes

Miscellaneous

No. 15061

United States
COURT OF APPEALS
for the Ninth Circuit

WILLIA NIUKKANEN, also known as William Niukkanen, also known as William Albert Mackie,
Appellant,

vs.

JOHN P. BOYD, District Director, Immigration and Naturalization Service, United States Department of Justice, JOHN WILSON, Officer in Charge, Immigration and Naturalization Service Office,
Appellees.

BRIEF OF APPELLEES

Appeal from the United States District Court for the District of Oregon

JURISDICTION

The jurisdiction of the district court was invoked under Title 28, United States Code, Section 2241, and Title 5, United States Code, Section 1009. The jurisdiction of the Court of Appeals is invoked under Title 28, United States Code, Section 2253, and Title 28, United States Code, Section 1291.

This is an appeal from an order of the United States District Court for the District of Oregon dismissing appellant's amended petition for writ of habeas corpus and complaint for injunctive relief, discharging the writ of habeas corpus theretofore issued, exonerating the sureties and remanding the appellant to the custody of John P. Boyd, District Director of the United States Department of Justice, Immigration and Naturalization Service, to be held for deportation pursuant to the warrant and order of deportation previously issued.

STATEMENT

The appellant is an alien having been born in Finland on November 24, 1908.

On June 17, 1952, a warrant for the arrest and deportation of the appellant was issued by John P. Boyd, District Director of the Immigration and Naturalization Service, and this warrant was served upon the appellant on or about September 12, 1952. A hearing was thereafter held before Louis C. Hafferman, Special Inquiry Officer, on May 11, 1953, at Portland, Oregon, and on June 30, 1953, said officer issued a written decision holding the appellant deportable for the reason that he had become a member of the Communist Party of the United States after entry into this country. The specific finding was that he had been a member of the Communist Party during the years 1937-1939.

A timely appeal was made from this decision and on September 8, 1953, the Board of Immigration Appeals dismissed the appeal.

The appellant did not ask for suspension of the deportation order within the time provided, but after the expiration of the time defendant's counsel moved that the proceedings be reopened for the purpose of affording the appellant an opportunity to apply for suspension of deportation. The Board of Immigration Appeals denied counsel's motion on October 29, 1954. Thereafter an additional motion to reopen was made and on December 23, 1954, the Board directed a withdrawal of the outstanding order and warrant of deportation and a reopening of the proceedings for the purpose of affording the appellant an opportunity to apply for suspension of deportation. Such application was made and an additional hearing held at Portland, Oregon, which resulted in the issuance of an order denying suspension and dismissing the appeal, said order issued on May 1, 1955. (Exhibit A to the Supplemental Transcript of Record.) The amended petition for writ of habeas corpus and complaint for injunctive relief to prevent agency action was thereafter filed and a hearing held before The Honorable Gus J. Solomon at Portland, Oregon, which resulted in the entry of an order of which the appellant now complains.

Appellant's statement of points upon which he will rely in this appeal varies somewhat from the three specifications of error found on pages 4 and 5 of his brief. Specification of Error No. 3 in the brief appears to be of somewhat narrower scope than the general Statement No. 3 in the statement of points that the appellant was not afforded a fair hearing before the Immigration and

Naturalization Service. The government will attempt, therefore, to discuss the specification of errors as set forth in the appellant's brief and in addition make some comment regarding Point No. 3 as found in the statement of points of appellant on appeal.

SPECIFICATION OF ERROR NO. 1

Appellant states that Judge Solomon erred in failing to declare the Internal Security Act of 1950 and its various predecessors unconstitutional. He asserts that these acts are violative of Article I, Section 9(3) and the First and Fifth Amendments in The Constitution of the United States.

Harisiades v. Shaughnessy, 342 U.S. 580, 96 L. Ed. 586, 72 S. Ct. 512, and *Galvan v. Press,* 347 U.S. 522, 98 L. Ed. 911, 74 S. Ct. 737, have decided the questions of constitutionality which the appellant raises here.

Appellant's argument stated in its simplest terms is that the *Harisiades* and *Galvan* cases are wrong. He ignores the fact that whether right or wrong in these two cases the Supreme Court has expressed its opinion that the constitutional questions raised here are not well taken. It is therefore submitted that under the *Harisiades* and *Galvan* decisions the District Court did not err in failing to declare the Internal Security Act of 1950 unconstitutional.

SPECIFICATION OF ERROR NO. 2

Appellant asserts here, as he did below, that there was no substantial probative or reasonable evidence introduced at the deportation hearing to prove that he was a member of the Communist Party.

At that hearing the government called two witnesses —Walter R. P. Wilmot and Lee Arthur Knipe, who both testified under oath that they knew the appellant to be a member of the Communist Party. They testified that they had seen the appellant attend closed meetings of the party at which only members were admitted and also that they had seen him pay his Communist Party dues. Although Knipe was shown to have testified untruthfully during the deportation hearing concerning his record of convictions and thereby lessening his credibility as a witness, his testimony as to the appellant's membership in the Communist Party is corroborated by the witness Wilmot who was a credible and trustworthy witness at that proceeding.

The credibility of witnesses is ordinarily to be determined by the trier of fact—in this instance the Inquiry Officer. *Morikichi Suwa v. Carr,* 88 F. 2d 119 (9 Cir., 1937). It is the inquiry officer in a deportation proceeding who is in the best possible position to observe the demeanor of witnesses and his decision on the question of credibility should therefore rarely be disturbed.

In the case of *Acosta v. Landon,* 125 F. Supp. 434 (9 Cir., 1954), cited by appellant for another reason, the question of credibility of one of the witnesses was

raised. The appellant in that case had been instrumental in having the witness ousted from an executive position in his union and from membership in the union itself.

The appellant argued that the witness was so biased as to render his testimony unbelievable. In refusing to disturb the findings of the Inquiry Officer with regard to the witness' testimony, this court stated as follows:

> "In this case the critical issue as to whether Acosta was a member of the Communist Party turned on the credit to be given Chase's testimony. The inquiry officer gave it full credit though this court might have taken a different view of the testimony had the matter been before it de novo. It cannot be said that Chase's testimony was so improbable as to be unworthy of belief. Under such circumstances this court is obliged to accept the inquiry officer's finding." 125 F. Supp. 434, at p. 438.

It is fundamental that the efficient functioning of administrative bodies such as the Immigration and Naturalization Service depends upon their determinations and findings being disturbed by the courts only where such determinations and findings are based upon mere caprice or whim. If the court can find in the record of the proceedings before the administrative body some substantial evidence to support the finding, then such finding should not be disturbed. The scope of judicial review in cases of this type under no circumstances contemplates the substitution of the District or Circuit Court in place of the administrative body.

In the case of *Orvis v. Higgins,* 180 F. 2d 537 (2 Cir.), there appears the following statement:

"We must sustain a general or a special jury ver-

> dict when there is some evidence which the jury might have believed, and when a reasonable inference from that evidence will support the verdict, regardless of whether that evidence is oral or by deposition. In the case of findings by an administrative agency, the usual rule is substantially the same as that in the case of a jury, the findings being treated like a special verdict." 180 F. 2d 537, at p. 539.

Also to the same effect see *N.L.R.B. v. Universal Camera Corp.*, 179 F. 2d 749 (1950), where it is stated that the findings of an administrative agency are tantamount to a special verdict and must be sustained when based upon some evidence which a jury or administrative agency might have believed and when a reasonable inference drawn from that evidence will support a verdict or finding.

During the hearings conducted under the warrant of arrest in this case on May 11 and May 21, 1953, two witnesses were called on behalf of the government in an attempt to prove that the appellant was a voluntary member of the Communist Party of the United States from sometime in 1937 until 1939.

The first witness was Walter Robert Patrick Wilmot, who used the name W. B. Ayer while a member of the Communist Party. Wilmot, a citizen of the United States, was residing at the time of the hearing in New York City and testified that he joined the Communist Party in late 1936 or early 1937 at Portland, Oregon (Tr. 12). He went on to state that he eventually was assigned to the waterfront section of the Party and became editor of the Party's paper known as "Labor New

Dealer" (Tr. 13). He further testified that he first met the appellant in the summer or early winter of 1936 and knew him from that time until he, the witness, was put out of the Communist Party. This first meeting occurred at the home of Helmi Burns, who was the witness' secretary on the "Labor New Dealer."

Wilmot stated that he knew the appellant to be a member of the Communist Party, that he saw him pay Communist Party dues in the Gerlinger Building, which was the Communist Party office. His testimony was that appellant paid these dues to James Murphy or Clayton Van Lydegraff, James Murphy being the Secretary of the Portland section of the Communist Party (Tr. 14-15). In response to the question of whether or not he had ever seen the Communist Party book or membership card belonging to the appellant this witness testified that he had seen it as "it was there on the table" (Tr. 15).

The following testimony of witness Wilmot relative to the appellant's attendance at closed meetings of the Communist Party appears quite important and is as follows:

> "Q. Now you have stated that you attended closed Communist Party meetings. Did you ever see the respondent, William Albert Mackey, at any of these meetings which you attended?
>
> A. Yes I did.
>
> Q. Did he hold any office in the Communist Party as far as you were aware?
>
> A. To the best of my recollection I think he was a functionary in the Albina group. Secretary I believe. I am not positive of that. That is my impression.

Q. Were you a member of the Albina section at any time?

A. No. But I attended meetings of practically all the branches in my capacity as Editor of the paper, and other things involved, if you want me to explain it." (Tr. 15)

* * *

"Q. Did you know the respondent Mr. Mackey personally?

A. Oh yes.

Q. Did he ever come to your office, that is the office of the 'Labor New Dealer' during your editorship?

A. Yes.

Q. Did you know him personally prior to your joining the Communist Party?

A. I met Mr. Mackey at open or semi-open party functions and at dances and parties before I joined the party, and if I remember correctly, at the Finnish community picnic at Astoria.

Q. Then there is no question in your mind concerning his identification as being the person that you saw at what you have called closed Communist Party meetings?

A. No sir.

Q. Approximately at how many meetings of the Communist Party did you see him?

A. I can't answer that exactly. I went to sometimes three meetings a week for about two years and I know it was Mackey I saw at many. I can't say.

Q. More than one?

A. Oh yes." (Tr. 17)

In addition to his testimony as to appellant's attendance at closed meetings in Portland and the payment of dues, the witness Wilmot testified that appellant had attended a closed meeting at Aberdeen, Washington and had assisted in the circulation of the Communist Party newspaper "Labor New Dealer" (Tr. 19).

The other witness called by the government was Lee Arthur Knipe. His testimony was similar to that of the witness Wilmot in stating that the appellant had been a member of the Communist Party when Knipe had also been a member, and that he saw the appellant at closed meetings of the Party at the Finn Hall in Portland, Oregon (Tr. 66). Not only did this witness see the appellant at thirty to thirty-five closed weekly meetings at the Finn Hall, but also he testified that some meetings were held in his own home and that the appellant attended two or three of these. He stated that the appellant took an active part in the meetings of the Communist Party, and that while he never held any office to the witness' knowledge, he was on the executive board of the branch to which he belonged (Tr. 67-68).

The following testimony of the witness Knipe is quite important on the question of the payment of dues by this appellant, and is as follows:

"Q. Who was the Secretary of the Albina branch during your period of membership?

A. Greta Jessen.

Q. Did she collect dues from the various members of the branch or subsections?

A. She did.

Q. Did you at any time ever see Mr. Mackey pay his dues?

A. I did.

Q. Did you ever see his Communist Party membership book?

A. I did.

Q. Explain in what way or how you were able to see the book.

A. He paid his dues and would hand the book to her and she would paste stamps in the dues

stamp place or she would hand it to him to paste them in.

Q. Did you see it on more than one occasion?

A. Yes, several times." (Tr. 69)

It was found during the hearing and afterward that the witness Knipe had testified untruthfully with regard to his record of prior convictions. This of course would lessen his credibility as a witness. However the testimony of witness Knipe as set forth above, and in its complete form in the Transcript of Testimony, as to appellant's membership in the Communist Party and his payment of dues is corroborated by the witness Wilmot who was not discredited in any way.

An important fact to be remembered throughout this proceeding is that the appellant, while given every opportunity to testify in his own behalf, to deny the accusations of the two government witnesses, or to explain away in any way he saw fit the statements made by them, remained silent and neither explained nor denied these serious accusations which were the basis upon which this order of deportation rested. This silence on the part of the appellant is most significant in view of the fact that without explanation and without denial the testimony of the two government witnesses could and did result in an order that this appellant be deported from the United States, which deportation he now so strenuously opposes. This being a civil and not a criminal proceeding the Special Inquiry Officer had every right in taking the appellant's silence into consideration along with the uncontradicted evidence produced by the two government witnesses.

It is respectfully submitted that there is found in the testimony of these two witnesses ample substantial evidence of the appellant's voluntary membership in the Communist Party during 1937, 1938 and 1939. A situation of striking similarity occurred in the case of *Hamish Scott MacKay v. John P. Boyd, et al.,* 218 F. 2d 667. In that case the government witnesses at the administrative hearing testified as to the attendance of the petitioner at closed Communist Party meetings, his payment of dues, and his possession of a membership book. The only issue raised on the appeal to this Court was the sufficiency of the evidence, appellant asserting that the deportation order was not based on any substantial probative or reasonable evidence. This Court, in its per curiam opinion stated: "We find abundant evidence in the testimony of MacKay's wife and other witnesses to sustain the finding." 218 F. 2d 667.

Appellant also asserts under this Specification of Error that if he was a member of the Communist Party, his membership was so nominal as to render him nondeportable for that reason. Appellant cites *Galvan v. Press, supra,* for the proposition that the government must prove that an alien is more than a nominal member of the Party in order to deport him. The *Galvan* case stated that it was merely necessary for the alien to join the Communist Party voluntarily. Justice Frankfurter stated that it was the intention of Congress that the word "member" should have the same meaning in the 1950 Act as previously and that this intent precluded an interpretation limited to those who were fully cognizant of the party's advocacy of violence. The judicial

and administrative decisions prior to 1950 do not exempt aliens who join an organization unaware of its program and purposes. Citing *Kjar v. Doak,* 61 F. 2d 566; *Greco v. Haff,* 63 F. 2d 863.

Justice Frankfurter went on to state as follows:

> "It must be concluded therefore that support or even demonstrated knowledge of the Communist Party's advocacy of violence was not intended to be a pre-requisite to deportation. It is enough that the alien joined the party, aware that he was joining an organization known as the Communist Party, which operates as a distinct and active political organization and that he did so of his own free will." (347 U.S. 522 at 528)

Applying this test, the Hearing Officer's finding here, that appellant was a "member" of the Communist Party, is not in error for the testimony at the hearing was that the appellant attended closed meetings of the Communist Party, paid his dues at Communist Party headquarters, assisted in the circulation of a Communist Party newspaper and took an active part in the Communist Party meetings he attended. Under the test in the *Galvan* case, *supra,* this evidence furnishes an ample basis for the findings that the appellant was a "member" of the Communist Party within the meaning of the act.

In view of the foregoing, it is respectfully submitted that the finding that the appellant was a member of the Communist Party of the United States was based upon substantial evidence uncontradicted by the appellant or any witness called by him, and that his membership in the party was voluntary and conscious membership and not so accidental, artificial or nominal as to vitiate this valid deportation order.

SPECIFICATION OF ERROR NO. 3

Appellant contends that the Board of Immigration Appeals' denial of his application for suspension of deportation was so arbitrary and capricious as to constitute an abuse of discretion and that the court below erred in not so finding.

It is readily conceded that the cases cited on page 17 of appellant's brief anounce the rule that the order of the Board is judicially reviewable. It is likewise conceded that if the order denying suspension constitutes an abuse of discretion, it should be set aside on review. Such is not the case here.

It will be remembered that this immigration proceeding was reopened for the sole purpose of allowing the appellant to petition for suspension of the deportation order; a hearing on the application for suspension was held, at which time the appellant testified in his own behalf.

Even the most cursory reading of the opinion of Louis C. Hafferman, Special Inquiry Officer, denying the suspension of this deportation order, will make apparent the fact that the denial was not capricious or arbitrary. Hafferman's opinion, which is part of the record before this court, makes it clear that he had doubt as to the credibility of the appellant when he testified at the hearing on his petition for suspension. The appellant's answers to many of the questions were evasive and Hafferman found that his demeanor was such that he was not to be believed. It is, of course, a fundamental

principle that the trier of fact is in the best possible position to observe and judge the credibility of the witness' appearing and giving oral testimony before him. Where the disbelief in the testimony of a witness is based upon observation of him, the courts are obliged to accept that finding. *N.L.R.B. v. Dinion Coil Co.,* 201 F. 2d 484 (2 Cir. 1952).

The transcript of the original deportation hearing in 1953, together with the proceedings at the hearing on the application for suspension, are before this court, together with the findings of the Special Inquiry Officer denying suspension. We believe that no useful purpose could be achieved by setting forth here portions of the testimony or quoting to any great length from the Inquiry Officer's findings; however, it is respectfully submitted that a review of the testimony, together with the findings, will lead this court to the conclusion that Hafferman and the Board of Immigration Appeals have not abused its discretion and have not acted in an arbitrary and capricious manner.

As stated earlier, the third point contained in appellant's concise Statement of Points of Appellant on Appeal differs somewhat from the Specification of Error No. 3 discussed above and contained in appellant's brief at page 5. This third point will therefore be discussed briefly below.

POINT 3 OF APPELLANT ON APPEAL

Appellant states in his list of Points on Appeal that he was not afforded a fair hearing before the Immigration and Naturalization Service. Inasmuch as he did not discuss this point in his brief, it is impossible for the government to know wherein he contends that his various appearances and hearings before the Immigration Service were not conducted in a fair manner. Again, a review of the entire record in this case, it is submitted, will make immediately apparent that the appellant was given every opportunity to bring forth evidence to refute the charge that he had been a member of the Communist Party. At the original hearing, he was represented by competent counsel experienced in immigration matters. He was given every opportunity to give testimony in his own behalf relative to alleged membership in the Communist Party and he chose to remain silent on that point. Thereafter, he did not choose to petition for suspension of the deportation order until after the time for such petition had expired. When he did decide to petition for suspension, the Department of Justice allowed his case to be reopened to afford him that privilege and, again, at a hearing, he was represented by competent counsel and this time gave testimony in his own behalf.

At each point in the administrative proceedings, at each hearing, this appellant was given every opportunity to explain his alleged membership in the party and to bring forth witnesses on his own behalf to prove that he was not a member of that organization. At each point

in the administrative proceedings and at each hearing, he was represented by competent legal counsel, well-acquainted with the administrative practice before the Immigration and Naturalization Service. In view of these facts, the bare statement that the appellant was not afforded a fair hearing before this body is a hollow one, indeed, and not worthy of notice by this court. *Harisiades v. Shaughnessy, supra.*

CONCLUSION

Judgment of the District Court dismissing the amended petition for writ of habeas corpus and complaint for injunctive relief, discharging the writ of habeas corpus and remanding the appellant to the custody of the District Director of the Immigration and Naturalization Service for deportation, should be, in all things, affirmed. This appellant was found deportable after a fair hearing and under a constitutional statute. Further delay in the execution of this valid deportation order should not be tolerated.

Respectfully submitted,

C. E. LUCKEY,
United States Attorney,
District of Oregon,

JAMES W. MORRELL,
Assistant U. S. Attorney,

Attorneys for Appellees.

November, 1956.